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No.

IN THE

Supreme Court of the United States

October Term, 1983

GEORGE ARTHUR, ET AL.,
Plaintiffs-Appellees,

—and—

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, ET AL.,
Plaintiffs-Intervenors-Appellees,

v.

EWALD P. NYQUIST, Individually and as Commissioner of Education of the State of New York, et al.,
Defendants-Appellees,

BUFFALO TEACHERS FEDERATION, ET AL.,
Defendants-Appellants.

On Writ of Certiorari to The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Can a federal court grant increased job security to junior minority teachers who were not victims of the acts of past discrimination, by supressing a bona fide statute requiring layoffs by seniority to the detriment of senior non-minority teachers then terminated out of seniority order?

2. Does the order of United States Court of Appeals for the Second Circuit, affirming the judgment of the district court, constitute an impermissible and unjustified instrusion upon a valid state statute (New York Education Law §2585, §2573.10a; McKinney, 1981)?

3. Was the Court below correct in abrogating the rights of majority teachers who were found by the lower court to be "innocent bystanders" not party to the past discrimination of the employer and in not penalizing the employer in any way?

4. Does the Second Circuit's decision conflict with its prior holding in *Chance* v. *Board of Examiners*, 534F. 2d 993 (2d Cir. 1976), cert. denied 431 U.S. 965 (1977) and with the decision of the Sixth Circuit in *Oliver* v. *Kalamazoo*, 706F. 2d 757 (6th Cir. 1983)?

The Parties in the Court Below

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

Court of Appeals Docket No. 82-7802

GEORGE K. ARTHUR, NAACP, Buffalo Branch, CITIZENS COUNCIL FOR HUMAN RELATIONS,

Plaintiffs-Appellees,

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, LOURDES AGOSTO, individually and on behalf of her minor children Samuel Jose & Pablo Agosto, Jr. and ELSA CRUZ, individually and on behalf of her minor child Monica Cruz, ANNETTE Y. BROWN, as Parent of James C. Satterwhite, a child presently enrolled in the Buffalo City School System, as a trainable, mentally retarded student on behalf of herself and other parents of trainable mentally retarded students in the City of Buffalo School System,

Plaintiffs-Intervenors,

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, CITIZENS FOR QUALITY EDUCATION, JOHN BUSHEY,

Plaintiffs-Intervenors-Appellees,

v.

EWALD P. NYQUIST, Individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., AALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN,

WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL, and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, JAMES GRIFFIN, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD R. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS, and WILLIAM A. PRICE, constituting the members of the Common Council of the City of Buffalo,

Defendants,

CITY OF BUFFALO, BOARD OF EDUCATION and ITS MEMBERS EUGENE T. REVILLE, Superintendent of Schools, JAMES GRIFFIN, Mayor of Buffalo, COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants-Appellees,

BUFFALO TEACHERS FEDERATION, CAROL BAUDA, MARJORIE AVERSANO, THEODORE ANNAS,

Additional Defendants-Appellants.

TABLE OF CONTENTS

Page

Questions Presented for Review i
The Parties in the Court Below ii
Table of Contents iv

Appendices to Petition v
Table of Authorities vi
Opinions Below 2

Jurisdictional Statement 3
Constitutional and Statutory Provisions Involved 3
Statement of Case 5
Reasons for Allowance of Writ 7

Petitioners With Seniority And Tenure Under The State Statute Are Innocent Bystanders. Their Rights Should Not be Abrogated in Favor of Individuals Who Are not Victims of Past Discrimination. 8

The District court Exceeded Its Authority Since Its Remedy Bore No Reasonable Relationship To the Scope of The Constitutional Violations. 9

The Decision Here Conflicts With An Earlier Second Circuit Decision And With The Recent Decision Of The Sixth Circuit In *Oliver* v. *Kalamazoo Board of Education*, 796 F. 2d 757 (6th Cir. 1983). 11

Page

Appendices to Petition:

Appendix I - Opinion of the United States Court of Appeals for the Second Circuit and filed July 22, 1983, and reported at 712 F. 2d 816 ..... 1a

Appendix II - Judgment of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983 ..... 19a

Appendix III - Mandate of the United States District Court of the Western District of New York, per John T. Curtin, Chief United States District Judge, dated July 22, 1983, and filed September 6, 1983 ..... 21a

Appendix IV - Opinion of the United States District Court for the Western District of New York, per John T. Curtin, dated and entered August 21, 1982, and reported at 520 F. Sup. 961 (W.D.N.Y. 1981) 22a

Appendix V - New York Education Law Section 2585 . 33a

Appendix VI - New York Education Law Section 2573.10-a 35a

Appendix VII - Federal Statutory Provision 37a

Page

TABLE OF AUTHORITIES

Cases:

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 7
Arthur v. Nyquist, 520 F. Supp. 961 (W.D.N.Y. 1981) 5
Brown v. Neeb, 644 F. 2d 551 (6th Cir. 1981) 12
Chance v. Board of Examiners and Board of Education etc., 534 F. 2d 993 (2d Cir. 1976) cert. den., 431 U.S. 965 (1977) .. i, 11
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) . 8
Fullilove v. Klutznick, 448 U.S. 448 (1980) 9
Hills v. Gautreaux, 425 U.S. 284, 293 (1976) 10
Milliken v. Bradley, 418 U.S. 717, 744 (1974) 10
Oliver v. Kalamazoo Board of Education, 706 F. 2d 757 (6th Cir. 1983) ..... i, 12, 13
Pasedena v. Spangler, 427 U.S. 424 (1976) 10
Steelworkers v. Weber, 433 U.S. 193 (1979) 9, 11
Stotts v. Memphis Fire Dept., 679 F. 2d 541 (6th Cir. 1982) .. 12
Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971) 10
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 7, 8
Washington v. Davis, 426 U.S. 244 (1976) 7, 8

Federal Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, *et seq.* .. 7

State Statutes:

New York Education Law Section 2573.10(a) ..... i, 4, 5, 6, 7
New York Education Law Section 2585 ..... i, 4, 6, 7, 8, 9

Constitution:

Amendment V 4
Amendment IX 3
Amendment X 4
Amendment XIV, Section 1 4
Article I, Section 1 3
Article II, Section 1 3
Article III, Section 1 3

IN THE

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October Term, 1983

No. _____

GEORGE ARTHUR, ET AL.,
Plaintiffs-Appellees,

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COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, ET AL.,
Plaintiffs-Intervenors-Appellees,

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EWALD P NYQUIST, Individually and as Commissioner of Education of the State of New York, et al.,
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Defendants-Appellants.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion dated July 22, 1983, of the United States Court of Appeals for the Second Circuit is reported at 712 F. 2d 816, and is reproduced in the Appendix at page 1a.

The opinion dated August 21, 1981, of the United States District Court for the Western District of New York per Curtin, Ch. J., is reported at 520 F. Supp. 468 and is reproduced in the Appendix at page 22a.

Jurisdictional Statement

The Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated July 22, 1983, and was entered on the same day in the Office of the Clerk of said Court.

The Mandate was filed in the United States District Court for the Western District of New York on September 8, 1983.

No application was made by any party for rehearing by the Court of Appeals; and no order was granted respecting rehearing.

Jurisdiction is conferred on the Supreme Court of the United States to review the Judgment below of the United States Court of Appeals for the Second Curcuit by Writ of Certiorari by Title 28 USCA §1254(1), and pursuant to article III, §§1 & 2 of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

Constitutional Provisions

"Article I.

"Section. 1. All legislative Powers herein granted shall be vested in Congress of the United States, which shall consist of a Senate and a House of Representatives."

"Article. II.

"Section. 1. The executive Power shall be vested in a President of the United States..."

"Article. III.

"Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish..."

"AMENDMENT [IX.]

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by

the people."

"AMENDMENT [X.]

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"AMENDMENT [V.]

"No person shall be...deprived of life, liberty, or property without due process of law;..."

"AMENDMENT [XIV.]

"Section. 1. ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTORY PROVISIONS

42 U.S.C. 2000e

NEW YORK STATUTORY PROVISIONS

Education Law §2573.10a

Education Law §2585

Statement of Case

The original action in this matter was brought in state court as a writ of mandamus by the Buffalo Teachers Federation (hereinafter "Federation") union representing teachers against the Board of Education (hereinafter "Board) for the Buffalo Public School System (hereinafter "BPSS"). At the time the state court proceeding was commenced, there was already in progress an ongoing matter involving desegregation in the BPSS. The Board removed the state mandamus action to the Federal desegregation proceedings. A motion to remand back to state court was denied. [477F. Supp. 691 (W.D.N.Y., 1979)]. Thereafter, the Federation was made an additional defendant in the original desegregation case.*

The facts giving rise to the original action are as follows. In August of 1979 the Board, believing apparently that it was not in compliance with a prior order of the District Court concerning its professional teaching staff, announced and effected a series of changes in hiring and layoff policy. These changes were made unilaterally and in violation of state law and the collective bargaining agreement between the Board and the Federation. The Federation took the matter to state court, arguing that the Board had violated Section 2573.10(a) of the New York State Education Law by not appointing as probationary teachers those individuals who satisfied all the requirements stipulated in state law, *i.e.*, who were state certified and had passed a teacher's test administered by the Board pursuant to the state law. The long standing practice of the Board was to appoint such individuals as probationary teachers dependent on their rank order on an eligibility list based on test scores. Section 2573.10 (a) makes it mandatory for the Superintendent of Schools to administer the test and form the eligibility lists. Essentially the Board ignored the eligibility lists in making both probationary and temporary

* In 1976 the District Court held that the BPSS had been intentionally segregated (415 F. Supp. 904). This holding was affirmed by the Second Circuit (573 F. 2d 134, 1978).

appointments. Probationary appointments must be used under state law to fill permanent vacancies. Temporary appointments are used to replace permanent teachers who are on leaves of absence, for example, maternity or sabbatical leave.

The state court action also alleged generally that there were duly negotiated clauses in a collective bargaining agreement between the Board and the Federation which had been negotiated pursuant to a "bona fide seniority system" of which temporary teachers are an intrinsic part. Petitioners generally argue that these temporary teachers have rights under the bargaining agreement and have had such rights since at least 1969, the year these clauses first appeared in the collective bargaining agreement. In summary, these rights are that temporary teachers must be hired in rank order from the eligibility lists created pursuant to Section 2573.10(a) and that where lists have expired (or are not in existence), prior satisfactory service entitles a teacher to the temporary position in issue.

During litigation of this case the question of seniority on layoffs arose, a question crucial to this petition. The Board's position was that layoffs governed by Section 2585 of the Education Law of New York would not occur consistent with state law because it was going to maintain the ratios of majority to minority teachers.

Under the affirmative action and retention plan finally adopted by the District Court layoffs will occur to maintain the majority/minority ratios notwithstanding seniority, although contract teachers may not be displaced by probationary or temporary teachers.* The District Court also relieved

* Section 2585 is a classic "last in first out" seniority clause which contains provisions for recall rights. The District Court ruled that once a teacher is laid off and placed on a recall list or preferred eligibility list (Section 2585.5 of the New York Education Law) he or she will be subject to "one for one" hiring. The Second Circuit found that the recall aspect of the remedial plan was excessively harsh and remanded for entry of an order conducting recall in accordance with the statute. 570 F. 2d 816, A at 17a.

minorities from taking the teacher's test (which governs eligibility for original appointments) although there is nothing in the record on the test at all, much less a finding that the test is discriminatory.

Reasons for Allowance of the Writ

Petitioners argue that there is reversible error in not honoring seniority in layoffs, especially since the minorities who are being favored were not past victims of discrimination. New York Education Law Section 2585 represents a *bona fide* seniority system which has never been declared unconstitutional. The disputed order exceeds the remedial authority of the court and denies petitioners equal protection of law. Petitioners further argue that although this is a Fourteenth Amendment rather than a Title VII (Civil Rights Act of 1964) case, there should be no difference in result since historically the cases have held that the standards are more onerous for those seeking redress under the Fourteenth Amendment than under Title VII. *Washington* v. *Davis*, 426 U.S. 244 (1976). Under the Title VII cases, petitioners would clearly prevail on the lay off issue. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982) and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

Moreover, there is no showing that the disputed order satisfies any compelling need or meets any purposeful objective without which the minority school children will be further disadvantaged. There exists no justification at all for this finding. The disputed order also vitiates the test required by New York Education Law Section 2573.10(a) and unfairly voids the rights of teachers who passed the test and were placed on eligibility lists. The order now allows the test simply to eliminate majorities who fail the test; it has no effect on minorities. The record contained nothing to justify such an absurd result.

The writ should be granted in order for the Supreme Court to uphold in this case the seniority and statutory rights of

majority teachers who are victims of unconstitutional reverse discrimination and totally innocent of any wrong doing.

Petitioners With Seniority And Tenure Under The State Statute Are Innocent Bystanders. Their Rights Should Not be Abrogated In Favor Of Individuals Who Are Not Victims Of Past Discrimination.

Under the disputed orders, majority teachers with 20 years seniority may be displaced by minority teachers with four years seniority. The Second Circuit distinguished cases arising under the Fourteenth Amendment from those arising under 42 U.S.C. Section 1981, 1983 as well as 42 U.S.C. Section 2000 e *et seq.*. Petitioners believe such distinctions or those between private and public sector employers are untenable.

Petitioners argue that the rationale of the Supreme Court in *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) is applicable here. In *Franks, supra*, this Court ruled in favor of constructive seniority for identified victims of discriminatory hiring practices. However, where the disputed system was racially neutral (although having the effect of locking minorities into lower paid positions), the victims of past discrimination were limited to seniority from the date of their individual employment applications. In the instant case there is no showing that the minority teachers were victims of past discrimination.

This Court in *Teamsters, supra*, outlined criteria to determine if a seniority system is *bona fide*. In measuring such criteria against New York Education Law Section 2585, it is clear that the section easily passes muster. It applies equally to all groups; it is rational and in accord with most seniority practices for public employees. It was not initiated to have a racially discriminatory effect, nor has it been maintained for an illegally discriminatory purpose. *Id.*, at 355-356.

In *Washington* v. *Davis*, 426 U.S. 244 (1976) this Court noted that in addressing legislation such as Section 2585, it was

necessary to find proof of discriminatory intent. Petitioners argue that without proof of a racially discriminatory purpose in the genesis of Section 2585, the Second Circuit should have not found it unconstitutional as applied.

Petitioners also urge the consideration of the remedy approved by the Supreme Court in *Steelworkers* v. *Weber*, 433 U.S. 193 (1979). A plan of affirmative hiring was upheld because it did not unnecessarily defeat the present interests of white employees and, in the words of Justice Brennan, "does not require the discharge of white workers and their replacement with black hires." *Id.*, at page 201.

Justice Powell in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) at 516, stated that "the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however, worthy they may be." The Second Circuit has failed to heed Justice Powell's warning.

The District Court Exceeded Its Authority Since Its Remedy Bore No Reasonable Releationship To the Scope Of The Constitutional Violations.

When the Board of Education changed its policies in 1979, it did not do so at its own expense. Indeed, in the context of this case, the Board has hardly been inconvenienced. While senior experienced competent teachers are out in the cold, their rightful places assumed by minorities who as individuals were not discriminated against in any way, the Board of Education has assumed the stance of a stakeholder.

The Board argues that it could not increase minority percentages because it was "hamstrung" by the collective bargaining agreement and the various state statutes.

The District Court and the Second Circuit "bought into" the Board's position and relied to a great extent on the principle of law that "neither state law nor contract law may be used as a defense when the result would impede a court-ordered

remedy for constitutional violations" 520 F. Supp. at 966 (A28a). This rationale obviously "begs the issue." "The task is to correct by a balancing of individual and collective interests, the condition that offends the Constitution." *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). This Court has made it clear that a remedy fashioned by a federal court must be "carefully tailored to the scope of the violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974). Federal courts have broad equitable powers but such power "is not plenary." *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976).

In *Milliken, supra*, this Court commanded that the objective of the remedy should be "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 433 U.S. at 280. Here there has not been and can not be a showing that the favored minority teachers are in any sense victims of past discrimination. Nor has there been any showing of a need to layoff majorities to accomplish any court ordered objective related to the minority school children of the Buffalo Public School System, keeping in mind the overriding principle that the remedy is not permitted "to exceed the extent of the violations." *Swann, supra*. Petitioners argue that the disputed order creates a set of totally innocent victims who are likewise entitled to constitutional protections and who have effectively been denied such protections under the guise of "affirmative retention."

While it may be important to maintain the percentage of minorities currently teaching in the system, the situation does not justify doing so at the expense of petitioners. It is impermissible for the Second Circuit to engage in "equating racial imbalance with a constitutional violation calling for a remedy." *Milliken*, 418 U.S. at 741 n. 19. There exists no "substantive constitutional right to a particular degree of racial mixing or balancing." *Pasedena* v. *Spangler*, 427 U.S. 424 (1976) at 433-434.

Obviously, the available pool of qualified minority teachers

changes from moment to moment. If the Board had recruited minorities more aggressively in the past, petitioners would not face the situation of having seniority rights voided notwithstanding their blamelessness for the discriminatory practices of the employer.

It is also totally unfair to penalize the innocent majority teachers in this matter and not the Board of Education. The Court order has imposed "firings" based on color and not seniority. Petitioners contend that the Court should have ordered "no lay offs" as the means of maintaining racial balance thereby avoiding any issue of "reverse discrimination." The issue instead would be the economic obligation of the wrongdoer, the Board. It is the wrongdoer not the innocent teachers, who should bear responsibility for remedying its wrongful deeds. *Steelworkers* v. *Weber*, 433 U.S. 193 (1979).

The Decision Here Conflicts With An Earlier Second Circuit Decision And With The Recent Decision Of the Sixth Circuit In *Oliver* v. *Board Of Education* 796 F 2d 757 (6th Cir. 1983).

In *Chance* v. *Board of Examiners*, 534 F. 2d 993 (2d Cir 1976) cert denied, 431 U.S. 965 (1977), the Second Circuit held it was "unconstitutional reverse discrimination" to ask senior more experienced non-minorities to forfeit seniority rights to junior less experienced minorities, 534 F 2d at 998,999. Here the Second Circuit totally reverses its position but dismisses the difference in a cursory footnote (712 F 2d 816 fn. 5, A 13a) indicating *Chance* was premised on 42 U.S.C. 1981 and is therefore inapplicable. The similarities between *Chance* and the instant case are striking. Both involve the same statute, Education Law 2585.4, and both involve large city school districts with large minority student populations. Petitioners respectfully submit that there is no perceptible distinction in the two matters. The fact that the proceeding here is part of a school desegregation case is irrelevant without a finding on the record indicating some compelling reasons for the order from

the perspective of the minority school children. Nothing in the record justifies such a finding.

When *Oliver* v. *Kalamazoo Board of Education*, 706 F 2d 757 (6th Cir. 1983) is read in conjunction with the instant case, it is obvious that both courts applied different standards to the same factual scenario. In *Oliver* the Sixth Circuit found that the record did not demonstrate that "nullification of the seniority and tenure rights of white teachers" was "necessary to vindicate the student's constitutional rights." "Indeed the record is silent as to the actual effect of the layoffs on the students." 706 F. 2d 757. In the instant proceeding the record is also silent about the effect of the layoffs on the plaintiff students.

The Sixth Circuit rule is that contract and statutory rights of non-minorities must be enforced unless it is shown that the plaintiff's constitutional rights have been infringed and nullification of the contract and statutory rights of non-minorities is necessary to vindicate the plaintiff's constitutional rights. *Oliver, supra; Stotts* v. *Memphis Fire* Dept., 679 F. 2d 541 (1982) at 569. In *Brown* v. *Neeb*, 644 F. 2d 551 (6th Cir., 1981) as well as in *Oliver, supra*, the Sixth Circuit found the "necessary" standard more appropriate than the "reasonable" standard to protect the non-minority teachers' expectations in seniority rights in this type of case. In *Oliver, supra*, however, the Circuit Court overturned the district court's order for lack of proof of necessity. The Second Circuit herein said it was applying the Sixth Circuit's standards, but it pointed to nothing in the record to support its finding that nullification of seniority rights of non-minority teachers was "necessary" to vindicate the plaintiff students' rights. In fact, the Second Circuit finding does not even conform to the "reasonable" standard.

Finally, in *Oliver, supra*, the Sixth Circuit cited with approval earlier court action in its case and the decision in *Brown, supra*, enjoining layoffs to maintain existing percentages of minorities. The court pointed out that specific

compelling evidence existed in both cases relating the remedial action directly to the vindication of constitutional rights. Yet even in those cases, the *Oliver* court said, the courts did not nullify seniority, contractual or statutory rights on non-minorities. Under *Oliver*, there is no record justification even for a "no layoff remedy," much less the remedy ordered herein.

Conclusion

This Court should review this case because of the conflict and ambiguity which now exists in the Circuit Courts concerning the appropriate circumstances for ordering the nullification of statutory and contractual seniority rights of non-minority "innocent bystanders." This matter is of substantial public importance and concern. For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX I

Opinion of the United States Court of Appeals for the Second Circuit and filed July 22, 1983, and reported at 712 F. 2d 816

George Arthur, Et Al.,
Plaintiffs-Appellees,

—and—

Community Advisory Board For Bilingual Education Of Buffalo, Et Al.,
Plaintiffs-Intervenors-Appellees,

—v.—

Ewald P. Nyquist, Individually and as Commissioner of Education of the State of New York, Et Al.,
Defendants-Appellees,

Buffalo Teachers Federation, Et Al.,
Defendants-Appellants.

No. 962, Docket 82-7802

United States Court of Appeals,
Second Circuit.

Argued April 6, 1983
Decided July 22, 1983.

Robert D. Clearfield, Gen. Counsel, New York Educators Association, Albany, N.Y., for defendants-appellants.

Thomas I. Atkins, Gen. Counsel, NAACP, Brooklyn, N.Y. (David Gerald Jay, Buffalo, N.Y., on the brief), for plaintiffs-appellees.

J. Edmund DeCastro, Jr., Buffalo, N.Y. (Jaeckle, Fleischmann & Mugel, Buffalo, N.Y., on the brief), for plaintiffs-intervenors-appellees.

Aubrey V. McCutcheon, Jr., Buffalo, N.Y. (James J. McLoughlin, Acting Corp. Counsel, William E. Carey, Asst. Corp. Counsel, Buffalo, N.Y., on the brief), for defendants-appellees.

Before: Kaufman, Timbers, and Newman,

Circuit Judges.

NEWMAN, *Circuit Judge*:

This appeal concerns primarily the degree to which a district court can impair the seniority rights of teachers in order to eliminate the vestiges of racial segregation within the faculty of a public school system and to vindicate the school children's right to a desegregated education. The Buffalo Teachers Federation (Federation) challenges a remedial plan adopted by the District Court for the Western District of New York (John T. Curtin, Chief Judge) for the Buffalo school system. *See* 520 F. Supp. 961 (W.D.N.Y. 1981). As part of that plan, the Court approved an elaborate remedy designed to achieve a goal of twenty-one percent minority teachers in all teaching areas through a race-conscious system for hiring and laying off teachers. Although we find the District Court's plan to be basically sound, we conclude that in one respect the Court's remedy is unnecessarily harsh. We therefore affirm in part, reverse in part, and remand for the entry of a modified order.

I.

In April 1976, the District Court found the Buffalo Board of Education responsible for intentionally causing and maintaining a segregated school system. 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd in relevant part*, 573 F.2d 134 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, 439 U.S. 860 (1978). Among the Board's discriminatory policies was a purposeful program "that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo public schools." *Id.* at 946. Between 1967 and 1973, minority employees had held roughly ten to twelve percent of all staff positions, even though the

minority population of Buffalo was twenty-one percent, according to the 1970 Census. *Id.* at 943-46. Moreover, a disproportionate share of the minority staff was assigned to schools with predominantly minority student bodies. *Id.*

As an initial matter, the District Court left to the Board of Education the task of developing a plan for desegregating its teaching and administrative staffs, but after numerous meetings with the parties, the Court came to the conclusion that judicial prodding would be necessary. Accordingly, on March 26, 1979, the District Court issued an order setting general guidelines for desegregating the staff of the Buffalo school system. With this order, the Court made two basic decisions: first, that the percentage of minority teachers and administrators in every job classification should be the same twenty-one percent that minorities represented in the community at large, and, second, that this twenty-one percent target should be achieved through "one-to-one" hiring, whereby the Board would have to hire one minority teacher for every majority teacher hired.

A.

To appreciate the plan eventually devised to implement the District Court's order, as well as the Federation's objections to that plan, some understanding of New York law and the Federation's collective bargaining agreement is necessary. In the Buffalo school system, there are three types of teachers: tenured teachers, probationary teachers, and temporary teachers. Probationary and permanent teachers are on the "tenure track" of the system. When a tenured position becomes available, the Board must appoint a probationary teacher. N.Y. Educ. Law

§ 2573(1)(a) (McKinney 1981). If satisfied with the appointee's services after three years, the Board then makes the teacher a tenured and therefore permanent member of the faculty. *Id.* § 2573(1)(a), (5). Under New York law, probationary appointments in the Buffalo system must be made from an eligibility list containing the names of all qualified applicants for a particular tenure area who have passed an examination administered by the Board.[1] *Id.* § 2573(10)(a); *see Serritella v. Board of Education*, 58 A.D.2d 634, 396 N.Y.S.2d 57 (2d Dep't 1977). Applicants are ranked on the eligibility lists according to their performance on the Board's examination, and the Board is supposed to offer probationary appointments to those at the top of the relevant lists.

Outside the tenure track, the Buffalo system has a considerable number of temporary teachers, who serve on a year-to-year basis without any guarantee of being rehired. Temporary teachers fill positions left vacant by permanent and probationary teachers on sabbaticals and sick leave. Many temporary teachers in the Buffalo system have served for a number of years. Typically, these long-term "temporary" teachers have many qualifications for permanent positions, but either have not passed the Board's examination for permanent employment or have not placed high enough on the eligibility list to be offered probationary positions. In selecting temporary teachers for a new school year, the Board looks first to the current eligibility list for qualified candidates. However, if the eligibility lists are empty or if no one on the eligibility lists

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[1] There is some question whether section 2573(10)(a) still applies to the Buffalo school system because the section is limited to municipalities with between 400,000 and 1,000,000 inhabitants. According to the 1970 Census, Buffalo fit within that category, but the 1980 Census found that Buffalo had a population of less than 400,000.

wishes to accept the temporary positions, then the Federation's collective bargaining agreement requires that the Board offer the positions to those who have held temporary appointments in the past. In this way, the perennial temporary teachers have a limited, but apparently valuable, form of job security.

Under New York law, if the Board of Education elects to reduce the number of tenured positions, it must lay off teachers according to seniority. N.Y. Educ. Law § 2585(3). For example, if the Board had to eliminate several full-time positions for mathematics teachers, it would first discontinue the most junior probationary teachers in that area and, when there were no more probationary incumbents, begin to lay off permanent teachers. Laid-off permanent and probationary teachers (known in the statutory jargon as "excessed" teachers) are placed on "preferred eligibility lists." When new full-time positions become available, the Board is supposed to reinstate excessed teachers from these preferred eligibility lists based on their seniority. *Id.* § 2585 (4). Teachers on preferred eligibility lists also have a right of first refusal for any temporary teaching positions that become available.

Having no guarantee of reemployment from year to year, long-term temporary teachers are not directly affected by layoffs. However, these teachers are indirectly affected. Layoffs create preferred eligibility lists and prevent a decrease in the number of names on the regular eligibility lists because fewer probationary appointments are made. Since the Board must offer all temporary positions to qualified teachers on both of these lists before hiring anyone else, long-term temporary teachers are less likely to be rehired when the Board reduces the number of tenured faculty members.

B.

The District Court's March 26, 1979, order mandating one-for-one hiring to reach a twenty-one percent minority target placed the Board in a dilemma. At least for the foreseeable future, the Board had no obvious means of obeying the order without violating the seniority system established by statute and collective bargaining agreement. Under that system, a large group of predominantly majority teachers was entitled to whatever new positions become available. In 1978, fiscal difficulties and a declining student population had forced the Board to eliminate many tenured positions. In 1979, these laid-off teachers, most of them majority members, filled the preferred eligibility lists. Further layoffs were expected in the near future. Moreover, the normal eligibility lists were also composed largely of majority applicants, who should under state law have the second chance at job opportunities (after those on the preferred eligibility lists). The paucity of minorities on the normal eligibility lists resulted in part, the District Court concluded, from the fact that minorities had been discouraged from seeking employment in the Buffalo school system because Buffalo was one of only two municipalities in the state to require applicants to pass a special examination after completing the normal certification process. *See* 415 F. Supp. at 947 & n.42.

The Board's first opportunity to respond to the District Court's order came in August 1979 as the Board prepared for the 1979-1980 school year. Although the record is not clear in every particular, at that time the Board apparently took two steps to comply with the order in light of both the established seniority system and the perceived short-term unavailability of qualified minority applicants. First,

the Board decided to engage in "block hiring," whereby the Board elected to hire as many minority teachers as possible in whichever job categories there were qualified minority applicants. Second, the Board decided to hire temporary rather than probationary teachers for certain tenure-track positions. The record does not explain why the Board took this action, but there may have been two explanations. First, the Board may have decided that it should not fill up tenure-track positions with majority candidates, but rather should appoint temporary teachers until qualified minorities could be found. The Board may also have concluded that it would be easier to meet the District Court's one-for-one hiring quota through temporary appointments, which carry less stringent qualifications than do tenured positions.

The Board's initial efforts at compliance brought the Federation into court. On September 5, 1979, the Federation filed suit in New York Supreme Court. The Federation alleged that the Board had violated New York law by failing to fill permanent teaching vacancies with probationary appointments from the top of the appropriate eligibility lists and that the Board had violated its collective bargaining agreement by failing to offer temporary positions to teachers on eligibility lists and teachers with experience in the Buffalo system. The Board successfully moved to have the Federation's case removed to federal court under 28 U.S.C. § 1443(2) (1976). The District Court subsequently consolidated that suit with the ongoing school desegregation litigation and joined the Federation as a defendant. *See* 477 F. Supp. 691 (W.D.N.Y. 1979).

While the Federation's claims were before the District Court, the Board of Education and lawyers for the plaintiffs agreed upon a formal plan for implementing the

Court's March 26, 1979, order. The District Court accepted this plan, with minor modifications, on August 8, 1980. At the same time, the District Court rejected the Board's use of block hiring on the ground that the technique led to a disproportionate number of minority teachers in elementary schools, thereby "concentrat[ing] minority personnel in racially identifiable . . . schools."[2] The District Court thus interpreted its March 26, 1979, order to require twenty-one percent minority representation in each tenure area.

The remedial plan, as adopted by the District Court, called upon the Board to create three applicant lists for every tenure area: a preferred eligibility list, consisting of excessed probationary and permanent teachers; a current eligibility list, containing candidates who have met all state requirements and have passed the special Buffalo examination; and a qualified applicant list, including candidates who have not passed the Buffalo examination but are otherwise qualified. Whenever any tenure-track position becomes available, the Board is first to determine whether it was a majority's or a minority's turn to be hired, according to the District Court's one-to-one formula. The Board should then scan the appropriate applicant lists for the highest ranking candidate. The Board should begin with the preferred eligibility list, then, if necessary, proceed to the current eligibility list,

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[2] The District Court subsequently ruled that majority teachers injured by block hiring were not entitled to relief through normal grievance procedures because the Board developed the technique in good faith compliance with the District Court's March 26, 1979, order. *See* 520 F. Supp. at 966. The Federation now contends that the Board's good faith should not prevent injured teachers from receiving back pay and lost seniority rights. In light of the complexity of this case and the District Court's familiarity with the Board's efforts, we conclude that it was within the Court's discretion to insulate the Board from liability for block hiring.

and finally look to the qualified applicant list. For those tenure areas in which no minorities appear on any of the three applicant lists, the Board is instructed not to make any probationary appointments so as not to violate the Court's one-to-one hiring requirements. In such cases, the Board was directed to make temporary appointments.[1]

The remedial plan called for temporary appointments to be made in a similar fashion. First, the Board was to determine whether the appointment goes to a majority or a minority applicant. Then the Board looks down the three applicant lists for a suitable candidate. If no name appears on these lists, the Board can appoint a candidate with an appropriate degree and eight credit hours in an approved teacher program, or, if nobody is available with those qualifications, a candidate with an appropriate degree.

Layoff procedures were also included in the remedial plan. Apparently, during the 1978-1979 cutbacks, the Board had excessed tenure-track teachers based on seniority and had thereby significantly reduced the ratio of minority teachers in the system. To avoid the same result in future layoffs, the plan called for force reductions based on existing minority/majority percentages in each tenure area. Before eliminating any positions, the Board must calculate the minority percentage holding probationary positions in the affected tenure areas as well as the minority percentage holding permanent positions. As long as these percentages fall beneath the twenty-one percent target, layoffs should be made, first from probationary positions and then from permanent positions, so

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[1] The plan allows the Board to make probationary appointments in violation of the one-to-one formula if the Board can "factually demonstrate the unavailability" of qualified minority candidates. To our knowledge, the Board has not taken advantage of this provision.

as to maintain the then current percentages of minority staffing.[4]

In subsequent proceedings, the Federation challenged various aspects of the remedial plan. Ultimately, its entire challenge to the plan, which had formed the basis of the removed state court proceeding, was dismissed in a judgment entered September 29, 1982. The Federation appeals from that judgment, effectively bringing before this Court its basic objections to the remedial plan.

C.

The District Court's remedial plan affects the contractual and statutory rights of the Federation's majority members in numerous ways. First, the plan denies some long-term "temporary" teachers their contractual right to be offered yearly appointments on the basis of their years of experience within the school system. Second, the plan abridges the rights of applicants on the current eligibility lists by limiting the number of available probationary positions and yearly temporary positions to which they have statutory and contractual claims. Finally and most seriously, the plan undercuts the job security of majority probationary and permanent teachers. Under the plan, these tenure-track teachers were more likely to be laid off

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[4] For example, assume that the Board has to eliminate ten permanent positions for high school math teacher and that there were at the time fifteen probationary teachers in this category, three minority and twelve majority. Since minorities constitute twenty percent of these probationary positions, only two of the ten firings could be minorities. Consequently, even if the minority teachers had the least seniority in the area, one minority would remain and more senior majority teachers would be laid off. If the Board had to make another five layoffs in the same area, the remaining five probationary teachers, including the one remaining minority teacher, would lose their jobs. That one minority probationary teacher would be laid off before any of the permanent teachers' jobs were put in jeopardy.

during force reductions because the plan overrode the "last-in, first-out" seniority system created by statute. In addition, once a majority tenure-track teacher is laid off, the plan makes it more difficult for that teacher to be rehired. Under statute and contract, excessed teachers on preferred eligibility lists are entitled to whatever temporary or tenure-track positions become available based on seniority. Under the plan, however, all appointments to temporary and permanent positions are to be made under the one-to-one formula. Consequently, under the plan, an excessed tenured majority member of the faculty, already laid off in contravention of seniority, might be denied reemployment in favor of a minority applicant with no experience.

II.

During the liability portion of this case, the District Court found that the Board of Education had consistently hired a disproportionately small percentage of minority staff members, and had intentionally assigned these minorities to schools with large minority student bodies. *See* 415 F. Supp. at 943-48. Such discriminatory policies are important indicia of a segregated school system, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971); *Green v. County School Board*, 391 U.S. 430, 435 (1968), and the Supreme Court has repeatedly encouraged district courts presiding over school desegregation cases to remedy the effects of these practices. *See Milliken v. Bradley*, 433 U.S. 267, 281-83 (1977) (*Milliken II*); *Davis v. Board of School Commissioners*, 402 U.S. 33, 35 (1971); *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). The question raised by this appeal is whether the District

Court exceeded its equitable powers by the means chosen to desegregate the faculty of the Buffalo school system.

The Federation argues that the District Court's remedial plan is invalid simply because it infringes upon statutory and contractual rights of majority teachers who played no role in the Board's past practices of segregation. We reject this argument. In *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*), the Supreme Court ruled that state laws cannot stand in the way of full remedies for constitutional violations. Here, the fact that the Federation has a seniority system should not be allowed to prevent or inordinately delay the achievement of a fully desegregated school system for the children of Buffalo.

Nor was the District Court's authority impaired, as the Federation contends, by the Supreme Court's decisions in *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In those Title VII cases, the Supreme Court ruled that bona fide seniority systems must be honored unless there has been a finding of actual intent to discriminate. *See* Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1976). Here, however, the suit was brought to remedy violations of the Constitution rather than Title VII, and the District Court made a finding of intentional discrimination in the Board's maintenance of a segregated school system.[5] We therefore agree with the District Court that it had the authority to

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[5] Similarly, this Court's decision in *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), is inapplicable because that case, brought under 42 U.S.C. § 1981 (1976), involved a layoff remedy adopted solely in the context of employment discrimination. *Chance* was therefore analogous to a Title VII suit and not a school desegregation case.

curtail the seniority rights of the Federation's membership in order to vindicate the constitutional rights of the minority children in the Buffalo school system. *See* 520 F. Supp. at 965-66; *accord Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 103 S. Ct. 62 (1982); *cf. Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983) (acknowledging power to make such an order, but reversing District Court's particular order). Once a local board of education has been found to have employed staff hiring practices that contribute to a racially segregated school system, the District Court has the power to remedy those practices and to override seniority systems that perpetuate those practices.

However, a district court should not exercise this power excessively. It must balance "individual and collective interests." *See Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 15-16. Moreover, "a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) (quoting *Milliken I*, *supra*, 418 U.S. at 744). In particular, when a district court is shaping relief that will infringe upon seniority rights, the court must take care that the relief is necessary to correct constitutional violations. *See Oliver v. Kalamazoo Board of Education*, *supra*, 706 F.2d at 763.

Applying these standards, we find the District Court's remedial plan to be largely acceptable. Certainly the District Court's imposition of "one-to-one" hiring goals was permissible. The Court set these goals only after the Board failed to increase significantly the number of minority teachers in the system. Indisputably, these goals have the effect of delaying the appointment of some majority candidates on the eligibility lists and preventing

certain long-term "temporary" teachers from being rehired. But the District Court was aware of these effects, and nevertheless concluded that the plaintiffs' interests in having a fully desegregated faculty in the foreseeable future justified the hardship to the teachers. We agree with the District Court that the expectations of the temporary teachers and the candidates on the eligibility lists were not so strong as to preclude the use of "one-to-one" hiring.

Similarly, it was not beyond the District Court's discretion to instruct the Board of Education to delay making probationary appointments in those areas in which insufficient numbers of qualified minority candidates were available to achieve "one-to-one" hiring. To allow otherwise would permit the current shortage of minority candidates to be reflected in the system's tenured faculty for years to come. There is some risk that the Board, preferring to appoint temporary teachers, might try to take advantage of this provision of the plan, but the District Court has offered the Federation adequate protection against this possibility. The Board is obliged to undertake extensive recruiting efforts to find minority candidates and members of the Federation may take their cases to arbitration if they feel that the Board has taken advantage of the District Court's order to avoid making probationary appointments, *see* 520 F. Supp. at 967.

A closer question is raised by the District Court's decision to order that future layoffs be made on a percentage basis to guarantee maintenance of the existing ratio of minority to majority teachers. Strong interests lie on both sides. Probationary and permanent teachers have a statutorily established expectation that layoffs will be based on seniority. However, the effect of such layoffs would constitute a serious setback for desegregation of

the school system. Between 1976 and 1981, the percentage of minority teachers in the Buffalo system increased from eight percent to fourteen percent. Seniority based layoffs would erode much of this progress and put the system even further away from the District Court's twenty-one percent target.[6] Faced with this conflict, the District Court concluded that percentage layoffs presented an equitable solution. Although some majority teachers who would otherwise have retained their jobs might be fired under the Court's plan, minority teachers would also bear some burden during cutbacks, and no tenured faculty members—either majority or minority—would be released until all probationary employees in the particular area were fired. In this way, the children in the school district would enjoy the benefits of a significantly, if not wholly, integrated faculty.[7]

Considering the intractability of the problem before the District Court, we find its use of percentage layoffs acceptable. We agree with the First Circuit that percentage layoffs present a permissible means of achieving constitutionally mandated objectives despite contractually or statutorily established seniority systems during periods

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6 The District Court's twenty-one percent target is not challenged on this appeal, and we therefore do not rule on its validity. We note, however, that other jurisdictions have been unwilling to approve teacher quotas based on the percentage of minority students in a school district or on minority population in a municipality. *See, e.g., Oliver v. Kalamazoo Board of Education, supra.*

7 In accepting percentage layoffs, the District Court rejected more radical proposals that would have allowed the Board to progress toward the twenty-one percent targets despite on-going layoffs. Other jurisdictions have experimented with such remedies. *See, e.g., Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 754 (W.D. Mich. 1980), *rev'd*, 706 F.2d 757 (6th Cir. 1983); *cf. Morgan v. O'Bryant, supra*, 671 F.2d at 25 n.3 (laid-off minority teachers given absolute preference in rehiring until targets met).

of staff reduction. *See Morgan v. O'Bryant, supra.* Although we sympathize with the individual teachers who suffered because of percentage layoffs, theirs is a burden that must be borne if we are to "eliminate root and branch" the segregated school system that once existed in Buffalo. *Green v. County School Board, supra,* 491 U.S. at 438.

The District Court's plan, however, does seem needlessly harsh in its treatment of laid-off probationary and permanent teachers. Under statute and collective bargaining agreement, these excessed teachers should be placed on preferred eligibility lists and given first chance, according to their seniority, at whatever temporary or permanent positions become available. However, under the District Court's scheme, these excessed teachers would be entitled to these positions only within the constraints of the Court's "one-to-one" hiring goals. While we can appreciate the District Court's desire to continue to make progress toward the twenty-one percent target even while majority excessed teachers remain on the preferred eligibility lists, we nevertheless find this aspect of the remedial plan unjustified.

Although the District Court found the lack of minority teachers to be a serious problem deserving a prompt remedy, the Court did not determine that relief could or should be instantaneous. For example, there is no reason to think that, in the absence of layoffs, the District Court would have ordered the Board to fire tenured majority teachers and replace them with minority candidates. We do not believe that the Court was justified in using firings precipitated by fiscal crises to achieve the same result. Without an explicit finding of demonstrable necessity, the District Court should not have impaired the rehiring rights of excessed probationary and tenured teachers.

On remand, the District Court should modify its remedial plan along the following lines. Layoffs may still be conducted on a percentage basis for each tenure area, but the laid-off teachers should be placed on preferred eligibility lists as they are laid off. Excessed teachers on preferred eligibility lists should then enjoy the same rights to new temporary and permanent positions that they are guaranteed by statute and collective bargaining agreement. This modification should eventually establish percentage rehiring equivalent to the percentage layoffs established in the District Court's plan, although majority excessed teachers with more seniority than minority excessed teachers will more quickly be rehired. We trust that the parties will assist the District Court in making these modifications.

The judgment of the District Court is affirmed in part and reversed in part; the matter is remanded for the entry of a modified order.

APPENDIX II

Judgment of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983

UNITED STATES COURT OF APPEALS

For The Second Circuit

Civ-1972-325C

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July, one thousand nine hundred and eighty-three.

United States Court of Appeals
Second Circuit
Jul 22 1983
A. Daniel Fusaro, Clerk

Present:

HON: IRVING R. KAUFMAN
HON: WILLIAM H. TIMERS
HON: JOHN O. NEWMAN
Circuit Judges,

Filed
Sept 6 8:41 AM '83
U.S. District Court
W.D. of N.Y.

APPENDIX II - Judgment of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983

GEORGE ARTHUR, ET AL.,
Plaintiffs-Appellees,

and

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, ET AL.,
Plaintiffs-Intervenors-Appellees,

v.

EWALD P. NYQUIST, ET AL.,
Defendants-Appellees,

BUFFALO TEACHERS FEDERATION, ET AL.,
Defendants-Appellants.

82-7802

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

A TRUE COPY
A. DANIEL FUSARO, CLERK
By FRANCIS X. GUNDHART
Chief Deputy Clerk

A. Daniel Fusaro
Clerk
EDWARD J. GUARDARO
by: Edward J. Guardaro
Deputy Clerk

APPENDIX III

Mandate of the United States District Court of the Western District of New York, per John T. Curtin, Chief United States District Judge, dated July 22, 1983 and filed September 6, 1983

GEORGE ARTHUR, et al.,

Plaintiffs,

v.

EWALD P. NYQUIST, et al.,

Defendants.

Civ-1972-325

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated July 22, 1983, having been filed in the office of the Clerk of this court on September 6, 1983, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

JOHN T. CURTIN
John T. Curtin
Chief United States District Judge

Dated: Septebmer 8, 1983

APPENDIX IV

Opinion of the United States District Court for the Western District of New York, per John T. Curtin, dated and entered August 21, 1982. Reported at 520 F. Sup. 961 (W.D.N.Y. 1981)

GEORGE ARTHUR, et al.,

Plaintiffs,

v.

EWALD P. NYQUIST, et al.,

Defendants.

Civ-1972-325

APPEARANCES:

JAY, KLAIF & MORRISON (DAVID G. JAY, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

JOSEPH P. McNAMARA, ESQ., Corporation Counsel of the City of Buffalo (AUBREY McCUTCHEON, ESQ., Special Counsel, WILLIAM E. CAREY, ESQ., Assistant Corporation Counsel, and JAMES P. CAHER, ESQ., Deputy Corporation Counsel, of Counsel), Buffalo, New York, for Mayor James D. Griffin, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, Defendants.

JAMES A. W. McLEOD, ESQ., Buffalo, New York, for Plaintiff-Intervenor Citizens for Quality Education.

JAECKLE, FLEISCHMANN & MUGEL (J. EDMUND deCASTRO, JR., ESQ., of Counsel) Buffalo, New York, for Plaintiff-Intervenor Puerto Rican Legal Defense and Education Fund.

SEROTTE, HARASYM & REICH (BRUCE A. GOLDSTEIN, ESQ., of Counsel) Buffalo, New York, for Plaintiff-Intervenor John Bushey.

ROBERT CLEARFIELD, ESQ., Buffalo, New York, for Intervenor Buffalo Teachers Federation.

In April of 1976, this court held that the Buffalo Board of Education and the City of Buffalo were guilty of intentional racial segregation of the Buffalo Public School System [BPSS]. The court's findings of fact and conclusions of law are fully reported in *Arthur* v. *Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd* 573 F. 2d 134 (2d Cir. 1978), *cert. denied Manch* v. *Arthur*, 439 U.S. 860 (1978). Numerous decisions have followed the original liability finding in an attempt to fashion a comprehensive and acceptable remedy. These decisions include my orders of March 26, 1979 and August 8, 1980, concerning staff hiring procedures adopted by the Board of Education subsequent to the liability decision.

The original decision contained a finding that non-white teachers, principals, and support staff were underrepresented in the PBSS and that the Board's failure to increase the minority teaching percentage was an intentional act of discrimination *Arthur* v. *Nyquist, supra* at 944-48. In each of my orders following this decision and at numerous meetings among the parties, the court has expressed its concern that the efforts of the Board to recruit and place minority teachers and staff personnel have been inadequate.

The history of the efforts made by the court and the parties to develop an affirmative action plan has been detailed in my prior orders. *See* orders of May 4, 1977, March 14, 1978, and February 23, 1979. The issue culminated finally in my order of March 26, 1979, which imposed a one-for-one hiring and recall goal upon the Board, to be continued until the ratio of minority school personnel reflected the same ratio existing in the general community. The defendants were ordered to submit a plan which would comply with the following guidelines:

> [The defendants shall adopt] 21% as the long-term percentage goal for the hiring and promotion of minority administrators, professional staff, and other staff. This figure shall be revised, if necessary, when the results of the 1980 census have been tabulated.
>
> The defendants shall determine the minority

percentage of their full and part-time staff for each job category (*e.g.*, principals, elementary classroom teachers, and custodians) and identify each category in which the minority composition is less than 21%. In accordance with their proposal, the defendants shall hire and promote one minority for every non-minority in the identified job categories until the long-range goal has been achieved. The one-for-one interim goal shall also apply to the rehiring of provisional teachers and to the rehiring of non-tenured teachers who were laid off as a result of the budget cutbacks instituted in July, 1978. See the court's order of February 23, 1979.

In meeting these goals, the defendants shall not be required to hire or promote any minority candidate who is not qualified for the position, as the job qualifications are currently defined by the Board. But defendants are directed to continue reviewing their selection criteria in order to minimize their impact on minority candidates (*see* Board's "Statement of Commitment," filed December 18, 1978) and to report to the court in writing on July 1, 1979 on their recommendations, if any, for changes in the selection criteria.

The Board and the plaintiffs jointly submitted a plan which complied with these guidelines. The plan was approved by the court as modified on August 8, 1980, and supplements my order of March 26, 1979. The Buffalo Teachers Federation (BTF) has noted some objections to the plan.

The motion currently before me concerns hiring and promotion practices adopted by the Board in August of 1979 and utilized during the 1979-80 school year. This motion was originally brought in New York State Supreme Court by the BTF in September of 1979. It was removed from the state court and consolidated with this case by order of the court. 477 F. Supp. 691 (W.D.N.Y. 1979).

In its motion, the BTF claims that the Board of Education violated provisions of New York Education Law by its failure

to appoint as probationary teachers certain qualified individuals who met the requirements for appointment and had been placed on the eligibility lists as mandated by state law. In addition, the BTF alleges that the Board of Education has breached the collective bargaining agreement existing between them by its actions regarding the hiring of temporary and probationary teachers and recall of teachers who had been excessed. According to the BTF, both tenured teachers and the individuals whose names were placed on the eligibility lists have vested rights under the *bona fide* seniority system established by the collective bargaining agreement, which rights have been violated by the Board.

After the case was removed to this court, the BTF continued to process the grievances of the individual teachers through the grievance/arbitration procedures of the collective bargaining agreement. These grievances were ripe for arbitration by April of 1980. The Board requested a stay of the arbitration proceedings from this court. The BTF meanwhile moved for summary judgment on its complaint. The motion for summary jdugement was denied. The Board's request for a stay of the arbitration proceedings was granted, but only temporarily. Because many issues regarding the proper construction of the collective bargaining agreement and state education law were presented, the court concluded that it would be advisable to have an arbitrator's interpretation of the contractual provisions relating to seniority, excessing of teachers and the applicable state education law relating, especially to hiring of probationary and temporary teachers. Accordingly, the parties were directed to present their grievances before an arbitrator pursuant to the provisions of the collective bargaining agreement. The arbitrator was instructed to render his decision without regard to the March 26 order of this court. *Order* of August 8, 1980.

In compliance, a hearing was held on January 28, 1981, before Arbitrator Thomas N. Rinaldo. Both the Board and the BTF appeared at the hearing. Testimony was taken from Ms. Edith Lewin, an Assistant to the President of the BTF, and Mr.

Frank Aquila, a UniServ Director of the BTF who testified concerning the traditional hiring practices of the Board of Education.

Arbitrator Rinaldo delineated the following questions as those presented by the parties for resolution:

(1) Must the Board of Education fill permanent vacancies with probationary appointments from teachers placed on eligibility lists?

(2) Where a permanent teaching vacancy exists, is the Board of Education required to make a probationary appointment?

(3) Must the Board of Education excess teachers in order of seniority from tenure areas?

(4) What rights does an excessed teacher have?

(5) Is the Board of Education required to fill temporary vacancies from eligibility lists?

After consideration of the applicable law, the Arbitrator rendered his decision regarding each issue. A summary of his findings follows:

> The New York State Education Law clearly mandates Boards of Education in a City School District with the population of the City of Buffalo to fill permanent vacancies with probationary appointments from teachers placed on eligibility lists. In the case of layoffs, the Education Law has recognized seniority and mandates that the least senior teacher in his tenure area is to be the first to be excessed. Any excessed teacher is to be placed on a preferred eligibility list in order of seniority based on service in the system. Boards of Education cannot deviate from the above mandated provisions of the State Education Law. State courts have strictly construed the provisions of the Education Law and invalidated actions by Boards of Education which have attempted to circumvent the law.
>
> In the case of temporary appointments, it is only

> necessary to look at Article XII (A) and (D) and the past practice of the parties to rule that the Board is required to fill temporary vacancies from eligibility lists and where eligibility lists and where eligibility lists have expired, temporary appointments must be made from experienced teachers who have satisfactory service with the Board.

The bottom line of the Arbitrator's decision is that "[a] ny hiring practices inconsistent with the above are either violative of the collective bargaining agreement or the New York State Education Law." The court accepts the Arbitrator's conclusions and his interpretation of the relevant law. Given that my order of March 26, as supplemented by the parties' plan, is at variance with the rules that generally govern, the question now before the court is what impact that order shall have upon state law and the collective bargaining agreement?

My prior decisions demonstrate that it has been the goal of the court as well as the parties to fashion a remedy which is comprehensive yet is "carefully tailored to the scope of the violation." Orders of February 23, 1979 and May 26, 1979; *and see Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Milliken* v. *Bradley*, 418 U.S. 717 (1974). In any case involving violations of constitutional rights, the basic rule, which has been reiterated time and time again, is that the remedy for the violations must be designed to make whole the victims of the actions. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Swann* v. *Charlotte-mecklenburg Board of Education*, 402 U.S. 1 (1971). In formulating and effectuating such remedies, courts must be guided by traditional equitable principles. As has been stated by the United State Supreme Court,

> a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> *Swann, supra at* 15-16 (1971).

The court's order of March 26, 1979, was issued in response to the Board's hiring and assignment policies, to redress the constitutional violations flowing from these practices. From the time of the first decision and in subsequent meetings and orders, the court has emphasized that affirmative recruitment and utilization of minority personnel for administrative, instructional, and non-instructional positions are crucial elements of the remedy. The court recognizes that the primary responsibility for implementation of any school desegregation order rests with the local school board. *Brown* v. *Board of Education*, 349 U.S. 294 (1955) [Brown II]. When it became obvious, however, that the Board had defaulted in its obligation to proffer an acceptable remedy, the court was nevertheless compelled to intervene with respect to faculty and staff appointments. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

The March 26 order was not decided with undue haste or without adequate preparation. It was the product of most careful consideration of all the evidence presented, of hearings held, and of numerous public and private meetings among the court and the parties. As a vital part of the remedy, the order, as supplemented by the plan, must be given effect. Applying basic principles of constitutional law, neither state law nor contract law may be used as a defense when the result would be to impede a court-ordered remedy for constitutional violations. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Bradley* v. *Milliken, supra; Morgan* v. *Kerrigan*, 530 F. 2d 431 (1st Cir.), *cert. denied* 423 U.S. 1066 (1976); *United States* v. *Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Cir.), *cert. denied* 395 U.S. 907 (1969); *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980). To the extent the provisions of the New York State Education Law and the collective bargaining agreement are in conflict with the provisions of the court's order, they may not be enforced but will be superseded by the order.

The position of the BTF is that the individual teachers have

vested rights in their positions which cannot be denied to them. The BTF characterizes these individuals as "innocent bystanders" who cannot be "displaced because of the discriminatory conduct of an employer." Brief for BTF at 21. The BTF relies heavily upon the facts that neither the union nor its members were defendants in the original action and that there has been no finding of discriminatory conduct on the part of the BTF or its members. The Union has cited to the court numerous decisions such as *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Teamsters* v. *United States*, 431 U.S. 324 (1977), which discuss the propriety of voluntary affirmative action programs and the validity of collective bargaining agreements. These cases, however, are not applicable to the instant motion. The court's examination of the BPSS's employment practices and the subsequent remedial orders were undertaken to protect the rights of the plaintiffs in this case: the minority school children and their parents. And, while it is a matter for serious concern and careful consideration, the expecttions of majority teachers must not be allowed to interfere with the court-ordered remedy. *Bakke*, *supra* at 300; *Oliver* v. *Kalamazoo*, *supra* at 752-55.

Thus, the provisions of the March 26 order and supplemental plan will remain in effect. The Board shall continue to adhere to its one-for-one hiring program, regardless of a minority applicant's placement on the eligible list, until the 21 percent goal established by the court has been met or surpassed for each job title within the system. The question remains, however, whether the Board may be liable to some individuals who were not appointed as probationary teachers for the school year 1979-80. The issue arises because the technique employed for hiring for that particular school year, called "block hiring," was ultimately rejected by the court as an effective tool for desegration. *Order* of August 8, 1980.

The Board's policy of block hiring was devised during 1979. The Board claimed that, because it was unable to achieve the 21

percent goal in each instructional category, its plan was to hire additional minority staff in the pre-Kindergarten through Grade 6 classes, thus offsetting the lesser successes in other grades and achieving the overall hiring objective. The policy was communicated to BTF representatives at a meeting held on August 25, 1979. The representatives were informed that some probationary offers which had been issued to individuals on the eligible lists were being withdrawn and that no further probationary appointments would be made.

Block hiring was rejected by the court as an acceptable affirmative action plan because it presented the danger that the pre-Kindergarten through Grade 6 classes would contain the vast majority of minority teachers and would become racially identifiable while other job categories remained segregated. Despite its ultimate rejection by the court, the Board's implementation of the policy was undertaken in a good faith effort to comply with the provisions of the March 26 order. In August of 1979, when it undertook to implement the block hiring policy, the Board was faced with the dilemma of whether to hire teachers from the eligible lists which would postpone or prevent attainment of the 21 percent hiring goal, or whether to act not in accordance with state law and contract law and hire away from the lists in favor of minority applicants. It was clear to the Board from earlier opinions that continued use of the lists would not be tolerated as an excuse for the Board's failure to recruit and place adequate numbers of minority staff. *Orders* of May 4, 1977, and March 26, 1979. (While prior submission to the court of the Board's plan would have been preferable, the Board nevertheless acted within the spirit of the order, and the court finds that its actions were reasonably undertaken in compliance with the order. Accordingly, the Board is not liable to those individuals whose names were passed over the eligibility lists and who were not hired.)

A separate issue is presented by the Board's decision, communicated to the BTF representatives at the same meeting, to hire temporary teachers instead of probationary teachers

where permanent vacancies existed. Arbitrator Rinaldo found that this practice was a violation of New York Education Law §2573 (10-a) which states:

> 10-a. In a city having a population of four hundred thousand and less than one million it shall be the duty of the superintendent of schools, at the direction of the Board of Education, to hold examinations whenever necessary, to examine all applicants who are required to have their names placed upon eligible lists for appointment in the schools of such cities and to prepare all necessary eligible lists. Eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. No eligible list shall remain in force for a longer period than three years. Recommendations for appointment to the instructional service, except for the position of superintendent of schools, associate superintendent, assistant superintendent, director, supervisor, principal, head of department, executive assistant to the superintendent, or any other office or position of the rank of supervisor or above, shall be from the first three persons on an appropriate eligible list so prepared.

New York law is clear on the issue. Whenever a permanent teaching vacancy exists, probationary appointment must be made. Any other action, such as appointment of a per diem substitute or temporary appointment, has been characterized as an "unlawful attempt to evade the tenure law." *Serritella* v. *Board of Education of Westbury School District*, 396 N.Y.S. 2d 57, 58; 58 A.D. 2d 645 (2d Dept. 1977). This court's decisions, on the other hand, are silent on this issue. The March 26 order states only that whenever probationary positions are available, they must be filled on a one-for-one basis. The Board had no reasonable basis for concluding that it was compelled by the court's order to hire only temporary instead of probationary teachers. Because the court's orders are not in contention with and not intended to supersede the state law, New York Education Law §2573 (10-a) remained in effect and should

have controlled the Board's actions.

Thus, the Board should have made probationary appointments to fill permanent vacancies. To the extent that the provisions of §2573 (10-a) were violated by the Board, the remedies provided for by state law are appropriate except that the Board shall not be responsible to any individual whose placement on the staff as a probationary teacher would have violated the one-for-one hiring order of March 26, 1979.

In summation, the court's order of March 26, 1979, will remain in effect, and the Board is directed to continue the policy of one-for-one hiring. The Board's actions in implementing its block hiring policy were justified under the circumstances and do not render the Board liable to individuals whose names were on the eligible list. Individuals who would have recieved probationary appointments consistently with §2573 (10-a) and the provisions of the March 26 order but for the Board's actions are entitled to a remedy. Arbitrator Rinaldo has retained jurisdiction over the grievances which were the source of the arbitration case, and the case is hereby remanded to the Arbitrator for the formulation of an appropriate remedy.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: August 21, 1981

APPENDIX V

New York Education Law Section 2585

§2585. Continuation in office of boards, bureaus, teachers, principals and other employees, et cetera

1. Except as otherwise provided herein the boards, bureaus, teachers, principals, supervisors, superintendents, heads of departments, assistants to principals, examiners, supervisors of lectures, directors and all other officers and employees of the school systems or of boards of education of the several cities of the state, lawfully appointed or assigned before June eighth, nineteen hundred seventeen, shall continue to hold their respective positions for the term for which they were appointed or until removed as provided in subdivision five of section twenty-five hundred twenty-three* of this article.

2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

3. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

4. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of

faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such corresponding or similar positions in the order of their length of service in the system.

L.1947, c. 820; formerly §2535; amended L.1948, c. 287; L.1949, c. 757; renumbered §2585, L.1950, c. 762, §2; and amended L.1976, c. 521, §§1,2.

• Now section 2573.

APPENDIX VI

New York Education Law Section 2573.10-a

10-a. In a city having a population of four hundred thousand and less than one million it shall be the duty of the superintendent of schools, at the direction of the board of education, to hold examinations whenever necessary, to examine all applicants who are required to have their names placed upon eligible lists for appointment in the schools of such cities and to prepare all necessary eligible lists. Eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. No eligible list shall remain in force for a longer period than three years. Recommendations for appointment to the instructional service, except for the position of superintendent of schools, associate superintendent, assistant superintendent, director, supervisor, principal, head of department, executive assistant to the superintenent, or any other office or position of the rank of supervisor or above, shall be from the first three persons on an appropriate eligible list so prepared. The board of education, on the recommendation of the superintendent of schools, shall designate, subject to the other provisions of this chapter, the kind and grade of licenses which shall be required for any position of the teaching staff, together with the academic and professional qualifications required for each kind or grade of license. No person required to have a license under the provisions of this chapter in order to be employed in a position who does not have such license shall have any claim for salary, except that a person who has been assigned to teach in a subject or field not specifically covered in his license but on the same rank or level of service shall be entitled to his salary. Notwithstanding any other provisions of this chapter, the superintendent of schools may establish continuing eligible lists for any classes of teaching positions for which examinations are required and for which he finds inadequate numbers of well qualified persons available for recruitment. Names of eligibles shall be inserted in such list from time to time in the rank corresponding to their final ratings as they are

tested and found qualified in examinations held at such intervals as the superintendent of schools may prescribe. Successive examinations shall, so far as practicable, be constructed and rated so as to be equivalent tests of the merit and fitness of candidates. The period of eligibility of successful candidates on continuing eligible lists shall be in accordance with the provisions of this paragraph.

APPENDIX VII

Federal Statutory Provisions

6. 42 U.S.C. 2000e-2(h) of the Civil Rights Act of 1964 as amended provides as follows, in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such tests, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6 (d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206 (d)).